The Buffalo Newspaper Guild, Local 26, The Newspaper Guild, AFL-CIO-CLC (Buffalo Courier Express) ***and*** **William L. Ball.** Case 3-CB-3740

May 16, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On November 19, 1982, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed a joint exception and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exception and brief and has decided to the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Buffalo Newspaper Guild, Local 26, The Newspaper Guild, AFL-CIO-CLC, Buffalo, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph according:

"(b) Publicizing in Respondent's membership newspaper (Frontier Reporter) the above-mentioned lawsuits to the extent found unlawful herein."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] The charge herein was filed on November 14, 1980, and served upon Respondent on or about November 14, 1980, not on the date indicated by the Administrative Law Judge. While it has no effect on our decision, we note that the Administrative Law Judge, at fn. 13 of his Decision, misstated the testimony of Respondent's witness, Harvey W. Anger. The record shows that Anger testified that, in his opinion, the same typewriter was used to type an allegedly forged memo ("the 'RJR' letter") and a letter from the Charging Party to Administrative Law Judge Batson.

We also note that subsequent to the issuance of the underlying Decision, the Board, in another proceeding, found, *inter alia*, that Respondent violated Sec. 8(b)(1)(A) of the Act by prosecuting William Ball before an internal union board and by filing internal charges against Ball for filing a unit clarification petition with the Board. 265 NLRB 382 (1982).

[2] We have modified the recommended Order and notice to conform it to the Administrative Law Judge's Conclusions of Law.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT prosecute that part of the complaint in the case of *Buffalo Newspaper Guild, Local 26, The Newspaper Guild, by its President Richard J. Roth* v. *Kenneth W. Kostolecki and William L. Ball*, Index No. E87467 (Supreme Court, Erie County, State of New York), which refers to Ball's unfair labor practice charges, being specifically paragraphs 20, 21, 22, 23, 24, and 25 and paragraph C of its prayer which arose out of Ball's filing of an unfair labor practice charge with the National Labor Relations Board, so as to discourage Ball or other members from filing unfair labor practices with the National Labor Relations Board.

WE WILL NOT publicize in our membership newspaper (Frontier Reporter) the above-mentioned complaint, so as to discourage our members from filing unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce our members in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL withdraw and dismiss that part of our complaint in the case of *Buffalo Newspaper Guild, Local 26, The Newspaper Guild, by its President Richard J. Roth* v. *Kenneth W. Kostolecki and William L. Ball*, Index No. E87467 (Supreme Court, Erie County, State of New York), which refers to Ball's unfair labor practice charges, being specifically paragraphs 20, 21, 22, 23, 24, and 25 and paragraph C of its prayer.

BUFFALO NEWSPAPER GUILD, LOCAL 26, THE NEWSPAPER GUILD, AFL-CIO-CLC

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The charge filed by William L. Ball, an individual, on November 14, 1981, was served on The Buffalo Newspaper Guild, Local 26, The Newspaper Guild, AFL-CIO-CLC, the Respondent herein, sometimes referred to as the Union, by certified mail on or about November 14, 1981. A complaint and notice of hearing was issued June

30, 1981. In the complaint it was charged that the Respondent had restrained and coerced employees of the Buffalo Courier Express in violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, herein referred to as the Act, by "[i]nstituting a civil complaint in the New York State Supreme Court, County of Erie, [on November 4, 1980] against Ball for monetary damages because he filed charges with the Board" and "[b]y publicizing in Respondent's membership newspaper (Frontier Reporter) [in December 1980] the civil complaints instituted against Ball described above."

The Respondent filed a timely answer admitting that it had instituted the civil complaint and that the same was published as alleged in the complaint but it denied that it had engaged in any unfair labor practices as alleged. It further answered:

> As and for an affirmative defense, Respondent alleges that the said lawsuit was filed against said Ball for the precise reasons set forth in the complaint in the said lawsuit, and substantially because it is alleged he filed false and perjurious charges in NLRB case No. 3-CB-3659, and also that he conspired with one Kenneth Kostolecki with respect to false and perjurious charges filed by the latter in NLRB case Nos. 3-CB-3582 and 3-CB-3590. Further, said Kostolecki filed charges in NLRB case No. 3-CB-3752 alleging that the New York State Supreme Court case against him was also a violation of Section 8(b)(1)(A), but the Regional Director of this Region has declined to issue complaint in said case, asserting in part that his investigation "revealed that the Union had a reasonable basis to conclude that your previous charges were without probable cause."

The case came on for hearing in Buffalo, New York, on April 12, 13, 14, and 15, May 11, 12, and 13, and July 27, 1982. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT,[1] CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE EMPLOYING ENTERPRISE

Buffalo Courier Express, Inc., herein called the Courier Express, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

At all times material herein, the Courier Express has maintained its principal office and place of business at Main Street, in the city of Buffalo, State of New York, herein called the Buffalo facility, and is, and has been at all times material herein, engaged at said location and facility in the publication of a daily newspaper.

At all times material herein, the following named persons occupied positions set opposite their respective names, and have been and are now agents of the Respondent, acting on its behalf, and are agents within the meaning of Section 2(13) of the Act:

Richard O. Roth	President
Randy Workoff	Vice president
Marie Scrivani	Secretary
Paul MacClennan	Treasurer
William Buil	Chairman—Courier Express
Joe Ritz	Vice Chairman—Secretary-Treasurer and alternate member of executive board Courier Express Unit[2]

In the course and conduct of its business, the Courier Express subscribes to interstate news services, publishes nationally syndicated features, and advertises nationally sold products.

During the past year, the Courier Express, in the course and conduct of its business operations, received gross revenues in excess of $200,000. During the same period of time, the Courier Express purchased and received goods and materials valued in excess of $50,000 at its New York facilities, which goods and materials were shipped directly to its New York location from States of the United States other than the State of New York.

The Courier Express is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent Union is the collective-bargaining agent for certain employees of the Courier Express with which it enjoys contractual relationship. The Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

First: The Respondent's contention as set out in its brief is that "the evidence in the record taken as a whole compel[s] the finding that the Respondent had a reasonable basis and no unlawful objective in commencing its state court action against William Ball, and that such action cannot therefore be held to be an unfair labor practice under the Act."

This contention is neither supported by the credible evidence in the record nor the law on the subject.

[1] The facts found herein are based on the record as a whole and the observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard to the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B.* v. *Walton Manufacturing Company and Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

[2] Admitted by the Respondent.

The Respondent in its answer has admitted that it filed a lawsuit against Ball for monetary damages because he filed unfair labor charges with the Board. This admission is sufficient to establish the General Counsel's *prima facie* case of the Respondent's violation of Section 8(b)(1)(A) of the Act. "It is clear that 'the mere filing of a lawsuit can restrain the exercise of [Section 7] rights.' *United Stanford Employees, Local 680* v. *N.L.R.B.*, 601 F.2d 980, 983 (9th Cir. 1979)." *Bill Johnson's Restaurants, Inc.*, 660 F.2d 1335, 1342 (9th Cir. 1981).

While Section 8(b) of the Act does not specifically make it an unfair labor practice for a union to discriminate against an employee because he has filed charges or given testimony under the Act "the Board has construed Section 8(b)(1)(A) of the Act as extending protection similar to that provided by Section 8(a)(4) to persons who file charges against labor organizations." *Power Systems, Inc.*, 239 NLRB 445, 448 (1978). In stating this proposition, the Board cited *Local 138, International Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679 (1964), and *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (1968).

In *Local 138, supra*, the Board stated at 681–682:

> Just as an employer violates the Act by resorting to restraint and coercion to restrict the right of an employee to file a charge, so too, does a labor organization infringe the rights of employees under this law by resorting to unlawful means to prevent or restrict employees from filing charges. As such conduct by an employer violates Section 8(a)(1), so does a labor organization's use of restraint or coercion violate Section 8(b)(1)(A).[3]

The General Counsel relies on the case of *Power Systems, Inc., supra*, as decided by the Board, whereas the Respondent relies on the reversal of this case, *Power Systems, Inc.* v. *N.L.R.B.*, 601 F.2d 936 (7th Cir. 1979). This case involved an employer rather than a labor union litigant as is the situation here. The Board held that the employer committed an unfair labor practice when it filed a civil lawsuit against an employee for filing a nonmeritorious unfair labor practice charge with the Board. While the court reversed the Board on the ground that substantial evidence did not support the Board's findings, it accepted the principle of law enunciated. The court stated (601 F.2d at 901):

> We recognize that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and that the Board may, in a proper case, act to curb such conduct.

[3] The Board cited *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann Texas Corp.]* v. *N.L.R.B.*, 366 U.S. 731, 738 (1961), where it is stated:

> In the Taft-Hartley Law, Congress added § 8(b)(1)(A) to the Wagner Act, prohibiting, as the Court of Appeals held, "unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a)(1)." 280 F.2d [616], at 620. It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights.

The Board followed *Power Systems, Inc., supra*, in the case of *The United Credit Bureau of America, Inc.*, 242 NLRB 921 (1979). This case was appealed to the Circuit Court of Appeals for the Fourth Circuit, *N.L.R.B.* v. *The United Credit Bureau of America, Inc.*, 643 F.2d 1017 (1981), cert. denied 108 LRRM 2823, 92 LC ¶13,050 (1981). Citing *Nash* v. *Florida Industrial Commission, supra*, the court said (at 1024), "Successful implementation of the Act thus requires that complete protection be given persons who, in good faith, file charges or testify. To this end Congress enacted Section 8(a)(4) . . . ." In affirming the Board, the court concluded (at 1025):

> The immediate impact of defending the state court lawsuit most definitely serves to impose a punitive measure upon the charging employee. The violation of Section 8(a)(4) is thus clear. Likewise, the message to United's employees is clear: assertion of protected rights (rights found subsequently to be meritorious by the labor board) will subject you, as a United employee, to a retaliatory lawsuit and all the expense and trouble that goes with it. The violation of Section 8(a)(1) is thus clear. We conclude that substantial evidence supports the Board's finding that United's lawsuit filed against its charging employee, Tonia Anderson constituted violations of Sections 8(a)(4) and (1) of the Act.

The Board again followed *Power Systems, supra*, in the case of *Bill Johnson's Restaurant, Inc.*, 249 NLRB 155 (1980). In affirming the Board (660 F.2d 1335, 1343 (1981)), the Ninth Circuit said:

> These circumstances, in the context of other unfair labor practices which the Board found, clearly permit a finding that the lawsuit was prompted by an improper motive. The immediate effect of this lawsuit upon Helton was to penalize her for filing an unfair labor practice charge with the Board. That motive and effect clearly produce a violation of section 8(a)(4). In addition, the lawsuit carried an implicit message to the other picketers: namely, that any persons who file charges against the restaurant or picket the restaurant will find themselves in court. The violation of Section 8(a)(1) is also clear.

The Board also followed *Power Systems* in the case of *Angle*, 242 NLRB 744 (1979), enfd. 638 F.2d 1296 (10th Cir. 1982).

These cases teach as well as does the Supreme Court of the United States that the avenue to the Board's processes must be kept completely free from any coercion or reprisals from employers or labor organizations.

The Supreme Court has opined in the case of *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), that "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be *completely free* from coercion against reporting them to the Board." (Emphasis supplied.) See also *N.L.R.B.* v. *Scrivener, d/b/a AA Electric Company*, 405 U.S. 117, 122 (1972).

This principle was also expressed in *N.L.R.B.* v. *Shipbuilders*, 391 U.S. 418, 424 (1968), a case in which the Supreme Court held a union violates Section 8(b)(1)(A) by disciplining a member for filing an unfair labor charge against it, where the Supreme Court said, referring to *Nash* v. *Florida Industrial Commission, supra*, 389 U.S. at 238:

> The policy of keeping people "completely free from coercion," *ibid.*, against making complaints to the Board is therefore important in the functioning of the Act as an organic whole. A restriction such as we find in § 5 of the Article V of the International's constitution is contrary to that policy, as it is applied here. A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. That was the philosophy of the Board in the *Skura* case, *Local 138, International Union of Operating Engineers*, 148 NLRB 679; and *we agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative*, except and unless plainly internal affairs of the union are involved. [Emphasis supplied.]

Second: On March 7 and 23, 1980, Kenneth Kostolecki filed unfair labor practice charges against the Respondent in which it was alleged that the Respondent violated Section 8(b)(1)(A) of the Act. The charges stemmed from letters which were sent to various employers around April 4, 1980, on the Respondent's letterhead, bearing the initials "RJR," the same initials as those of Richard J. Roth, president of the Respondent. One of the letters stated:

> To: Gilbert Smith Date: April 4, 1980
> Utica Observer Dispatch
>
> Subject: Kenneth Kostolecki
> From: Richard Roth
> Buffalo Newspaper Guild
>
> Mr. Smith:
>
> We are asking your continued cooperation in spreading the word on Kenneth Kostolecki. Kostolecki is continuing to file charges with the U.S. against anybody and everybody. We are determined that he will never again work in the newspaper business. I have spoken with Doug Turner at the C-E and Dan Kane in Tonawanda and they are cooperating. We have been getting the word out through Mr. Sweet at the newspaper publisher's assoc., who you probably know. Mike McKeating, a former union officer, is using his influence in the Erie County government to forestall any opportunities Kostolecki might seek in that area. Fran Crumb suggested that I contact you personally. RJR
>
> /s/RJR

Regional Director Thomas W. Seeler refused to issue a complaint (September 7, 1980), advising Kostolecki:

> As a result of the investigation in the captioned cases, it does not appear that further proceedings are warranted on the charges you filed inasmuch as the investigations revealed insufficient probative evidence that the charged-employers failed or refused to hire you because you had engaged in activity that is protected under the National Labor Relations Act, or that the charged labor organizations had engaged in a campaign to deny you employment. In this regard it is noted that virtually none of the numerous witnesses contacted during the investigations supported your charges in any meaningful way and that the charged employers, all of whom cooperated in the investigations, credibly denied that they participated in a "blacklist campaign" or that they denied you employment for any discriminatory reasons.
>
> In addition, with regard to the charges you filed against the captioned labor organizations, it is noted that little weight is attached to the letters addressed to the New York State Publisher's Association and to other employers, because it appears, based on the investigations, that there is substantial doubt that the letters were prepared by responsible officials of the Guild.
>
> Further, it is noted that your previous activities against the Buffalo Newspaper Guild, which were the subject of prior unfair labor practice charges, are insufficient to establish the further violations of the Act which you have alleged in the instant cases.
>
> It was also determined that the evidence you recently submitted was insufficient to substantiate your above-mentioned allegations. Accordingly, I am refusing to issue complaint in these matters.

On July 10, 1980, William L. Ball, the Charging Party herein, filed a charge against the Respondent in which it was alleged that the Respondent violated Section 8(b)(1)(A) in that it refused "to process his grievances and other matters." The grievances referred to in the charge were designated in the record as the "Discriminating Work Rule grievance," the "Sarah Fox grievance," the "John Connors grievance," and the "Text Processing Team grievance." On September 8, 1980, the charges were withdrawn by Ball with Regional Director Seeler's approval. Thereafter, on November 4, 1980, the Respondent commenced the civil proceedings in Supreme Court, County of Erie, State of New York, against Kenneth W. Kostolecki and William L. Ball referred to above. In its first cause of action the Respondent, referring to the unfair labor practice charge filed by Kostolecki, alleges, among other things, "The aforementioned proceedings were commenced by Defendant Kostolecki maliciously and without probable cause for the express purpose and with the intent of harassing, annoying and damaging Plaintiff and its membership, and for the purpose of causing Plaintiff to incur legal and other expenses in connection therewith, and were part of a

continuing effort to so harass, annoy and damage Plaintiff and its membership."

For its second cause of action the Respondent alleges, among other things, "Upon information and belief, in or about March, 1980, Defendants Kostolecki and Ball entered into a conspiracy to cause injury, embarrassment and expense to Plaintiff by agreeing to file the unfair labor practice charges referred to in Paragraphs 7. and 8. above in the name of Defendant, Kostolecki, and to provide false and perjurious information to investigators from the NLRB in support of said charges."

For its third cause of action, referring to the charge filed by Ball, the Respondent alleges, among other things, "the aforementioned proceeding was commenced by Defendant Ball maliciously and without probable cause for the express purpose and with the intent of harrassing, annoying and damaging Plaintiff and its membership, and for the purpose of causing Plaintiff to incur legal and other expenses in connection therewith, and were part of a continuing effort to so harass, annoy and damage Plaintiff and its membership."

Prior to Ball's filing of the July 10, 1980, charge, he had filed other charges against the Respondent. The parties stipulated:

> Case No. 3-CB-2107 filed in July 1973 was resolved by non-Board settlement, in which the Respondent agreed to process the grievance on which the charge was based.
>
> Case No. 3-CB-2260 was filed by Ball and resulted in a Board decision in the case 220 NLRB 79 . . . the decision was favorable to the Charging Party.[4]
>
> . . . there were a series of cases that were consolidated for trials. The numbers are as follows: Case No. 3-CB-2678, 3-CB-2717, 3-CB-2955, 3-CB-3003, 3-CB-3004, and 3-CB-3182. Those cases resulted in a decision by Judge Robert C. Batson, and are presently on appeal before the Board.[5]

Since the filing of Ball's first charge in July 1973 there has been a continuing confrontation between Ball and the Respondent's officers. Prior to the instant proceeding, the most recent encounter was the filing of the charge in Case 3-CB-3659 referred to above filed on July 10, 1981, in which Ball complained that the Respondent failed to process certain grievances.

Roth testified that throughout the period of confrontation members "got up at the meeting from time to time and asked and characterized the repeated filings of charges by Mr. Ball as harassment and maliciousness intended to bankrupt the Union and to ask if there was anything they could do to prevent those—the continuation of those."[6] According to Roth, the members in the union meetings asked "if there was something that they could do in terms of taking legal action against Mr. Ball because of all these charges and allegations and what-not that he had been making primarily with the National Labor Relations Board." In 1978 Roth consulted legal counsel Richard Lipsitz upon the direction of the executive committee to "see what we could do in terms of taking action against Mr. Ball." Counsel advised Roth that the Union "had no right to take any action against Mr. Ball; everything he was doing was protected under the provisions of the Act." The membership was so advised. In the "middle or end of 1979" when a member raised the subject of barratry (as noted above) the Union's counsel advised Roth that "he saw no grounds for proceeding against Mr. Ball at that time under English Law of Barratry."[7]

After Kostolecki's charge was filed and it was brought to Roth's attention that letters (see above) had been mailed with his initials, Roth conducted an investigation concerning the authorship of the letters. Roth reported "regularly" to counsel Lipsitz on his "findings." Roth testified, "Mr Ball was the only person that crossed my mind as having a motive to attempt to damage the Newspaper Guild."[8] In examining the letters, it was discovered that the lower case "g" appearing in the letters revealed a distinctive feature.[9] Whereupon Roth surveyed the typewriters to which Ball had access. He discovered a typewriter which Ball sometimes used with the same defect in the lower case "g." Upon inquiry of employee Cain, to whom the typewriter was assigned, Roth learned that Cain had "not typed the memoranda and that the only person that regularly used [Cain's] desk was William Ball." Moreover, Roth learned that Ball had had access to the Guild letterheads when he was the grievance chairman.

After Ball's charge was withdrawn, Roth conferred with counsel Lipsitz at his request in September 1980. Lipsitz reviewed the dismissal of Kostolecki's charges with Roth and indicated that by reason of "new case law"[10] the Guild might avail itself "of the opportunity

[4] In this case the Respondent was ordered to post a notice:

> WE WILL NOT threaten to place intraunion charges against William L. Ball, or to expell him from our Union, because he has filed charges with the Board, or because he participated in lawful intraunion activities, or because he engaged in other protected concerted activities.
>
> WE WILL NOT fail or refuse to process an employee's grievances because of his intraunion or protected concerted activities or because of his disagreement with the views, opinions, or conduct of the officers or agents of the Guild.

The Board also ordered the Respondent to process certain grievances for Ball. The Board's order was dated September 3, 1975.

[5] Administrative Law Judge Batson, in his decision, found for and against the General Counsel; however, he did not vitiate Ball's expulsion from the Respondent which occurred on July 8, 1976. Ball had been tried on May 25, 26, and 27, 1976.

[6] Roth further testified:

> I remember one in particular . . . it was early in 1979 when one of our members had found an article in a—I think it was the Philadelphia paper relating to successful prosecution under the English Common Law of barratry and brought that to a membership meeting and asked that if such a law was applicable in this jurisdiction.

[7] On July 20, 1979, Roth, by direction of the Respondent's executive committee, by letter requested attorney Lipsitz to give his opinion as to whether the union could initiate "a suit against William Ball, charging him with the common law crime of barratry."

[8] Telephone calls of similar content as the letters had been placed on the Guild phone in the name of Roth around a year earlier. Who was responsible for these calls was never ascertained.

[9] This defect was discovered by Lipsitz' secretary.

[10] *N.L.R.B.* v. *Power Systems, supra.*

that it had sought from him for several years to proceed against Mr. Kostolecki for maliciousness." They also discussed Ball's "involvement" in the Kostolecki case. Roth testified, "[W]e believed we had adequate evidence to present in the Supreme Court to demonstrate that Mr. Ball was a party to the preparation and mailing of these documents."

In early October, after the time for appeals had expired, Lipsitz advised Roth "that his continuing research indicated that we had a solid case to present in Supreme Court, and with the authority of the membership, he was prepared to file." Roth presented a recommendation to the membership to file suit against Kostolecki and Ball which was accepted "unanimously."

Roth testified that the "purpose of [the suit] was to recover some of the damages the Union had suffered during the years as a result of frivolous charges that we have had to defend over the years." Roth said the conspiracy theory was based on "information and belief with respect to the forgery of the document." Other than the letters noted above Roth tied Ball to Kostolecki because of his "suspicion with respect to their association was their long term relationship in terms of the Board, and in terms of the activities within the Guild." Roth thought they were "buddy-buddy." The initials "RJR" were apparently never submitted to a handwriting expert.

The Respondent called Lipsitz as a witness to "show our reasons for having recommended to a client, by the firm of Lipsitz, Green, by presenting the malicious prosecution question . . . ." Lipsitz testified that he had engaged in conversation with Guild representatives concerning Ball and Kostolecki for the past 4 or 5 years and that, upon request by Roth as to whether there was recourse against Ball and Kostolecki "because of the charges," he advised that "there was no legal basis for a lawsuit."

Lipsitz learned from Roth the facts surrounding the alleged authorship of the letters with the "RJR" initials of which Roth denied authorship. After Ball's charge was withdrawn, Lipsitz met Margaret Quinn who investigated Ball's claim for the Board. After reminding Quinn that this was one of the "rare occasions" that a Ball charge had not been "processed through a Complaint," and suggesting that "credibility findings had been made" he said, "My judgment is that Mr. Ball, unlike Mr. Kostolecki decided to then withdraw the charge." Quinn "smiled" and said, ". . . your judgment about what happened is pretty—pretty accurate." Whereupon Lipsitz said, "Margaret, did you tell him they were going to be dismissed because of such reason [adverse credibility findings]?" Quinn answered, "Well, he withdrew the charge instead."[11]

In respect to the "RJR" letters, Lipsitz testified that Regional Director Seeler looked at him and "sort of smiled" and said, "I would have a lot of difficulty in believing that Mr. Roth would do something like that."

In his meeting with Roth after the appeal period had expired on the charges, Lipsitz advised Roth that he believed there was a "basis" for instituting a lawsuit. Lipsitz told Roth that their research had "uncovered one [court] reversing the Board."

Citing the case of *Power Systems* v. *N.L.R.B., supra*, Lipsitz by letter dated September 11, 1980, advised the Union in part as follows:

> In summary form, the lawsuit would assert that Kostolecki (and if we agree Ball) maliciously and without proper cause, filed false charges against Local 26.

Ball and Lipsitz had been at odds with each other for several years. The Respondent offered a letter which Ball had written to Quinn on August 2, 1980, which illustrates the depth of Ball's feelings. It read in part:

> The union and Lipsitz have the power, money and influence to destroy an individual's personal and professional life. Lipsitz gives bad legal advice and makes a fortune defending the union in court and before agencies such as yours. He has nothing to lose. He makes tons of money and remains beyond the reach of any legal authority. Or at least that is what your agency is telling me.

In sum the evidence reveals that Ball and Kostolecki were believed by the Respondent to have been "buddy-buddy"; that Ball and the Respondent's officers and agents had incurred confrontations since 1973 over Ball's aggressive pursuance of grievances on his own behalf and that of others; that Ball had been successful in forcing the Respondent to process grievances by filing charges with the Board; that Ball had caused the Respondent to run a new election; that Ball had been fined and expelled from the Union for filing a UC petition with the Board, reprimanded for disruption of intraunion processes, and fined and expelled for alleged unauthorized filing of a charge with the EEOC against the Buffalo Courier Express;[12] that Kostolecki had filed a charge against the Respondent supported by letters which purported to have been sent by Roth, president of the Union; that Ball filed a charge against the Respondent on July 10, 1980, alleging the Respondent's failure to process grievances; that the Respondent was convinced that Kostolecki and Ball were liars; that the Respondent through an investigation of a defective typewriter to which Ball had access pinned in its mind the "RJR" letters on Ball;[13] that Kostolecki's charge was dismissed on credibility grounds; that a Board agent indicated that the Ball charge was withdrawn because of credibility deficiencies; that the Board had been reversed in *Power* v. *N.L.R.B., supra*, which influenced a favorable opinion

[11] Under the rule the General Counsel successfully barred Quinn from testifying. Thus, as to this incident, Lipsitz is credited.

[12] See Administrative Law Judge Batson's opinion JD-(ATL)-40-81.

[13] The Respondent offered the testimony of a typewriter comparison expert, Harvy W. Anger, who testified that the person who typed the "RJR" letter was the same person (Ball) who typed a letter to the General Counsel. While the typewriter expert's testimony was persuasive, I deem it immaterial since the forgery incident is unrelated to Ball's unfair labor practice charge which was for the Respondent's failure to process grievances for him. However, in the recommended Remedy (see *infra*) I have not restrained the Respondent from pursuing remedies against Ball for the alleged forgery and wrongful use of the Respondent's letterhead.

from the Respondent's legal counsel;[14] that the Respondent had been anxiously awaiting a time when it could throttle Ball with a lawsuit; that the purpose of the suit was to obtain compensation for the expense Ball had caused the Respondent in defending Board litigation and punitive damages; and that that there was no credible proof that Ball actually conspired with Kostolecki in the filing of the Kostolecki charges.

From the foregoing summary of the evidence and from the record as a whole, I am convinced that the Respondent filed the lawsuit against Ball for the purpose of discouraging Ball and other employees from filing charges with the Board against the Respondent and to punish Ball for having filed the current unfair labor practice charge and prior charges. Among other things, the Respondent demanded punitive damages.[15] By such behavior the Respondent discouraged employees from approaching the Board for filing unfair labor practice charges against it, an avenue of access which must be kept completely open. As in *Power Systems, supra*, 239 NLRB at 449, "Respondent's lawsuit placed its employees on notice that if an employee files charges with the Board which are deemed by the General Counsel to be nonmeritorious that employee is subjecting himself to the possibility of a devastating lawsuit." By including an alleged cause of action against Ball for filing unfair labor practice charges in its civil complaint, the Respondent sought to throttle Ball and render it unlikely that he would ever again raise his voice against any of the Respondent's unfair labor practices. The chilling effect of the Respondent's conduct not only touched Ball but carried over to other employees who were in the Respondent's bargaining units.

Since it is clear that the Respondent's motive in filing its civil court action was to discourage Ball and other employees from filing unfair labor practices with the Board against the Respondent and to punish Ball[16] for having filed unfair labor practice charges, it follows that the Respondent had no reasonable basis or grounds for filing its civil action. Thus, prompted by an improper motive, the Respondent's conduct violated the proscriptions of the Act. *Bill Johnson's Restaurant* v. *N.L.R.B., supra*. Moreover, it is immaterial in the consideration of the Respondent's misconduct as herein detailed whether Ball withdrew the unfair labor practice charge or the Regional Director would have dismissed the charge for lack of credible evidence to support it. "Employees, whether right or wrong, have a right to invoke the processes of the Board." *N.L.R.B.* v. *Auto Workers Local Union, Local 212*, 690 F.2d 82 (6th Cir. 1982).

Accordingly, I find that the Respondent by its misconduct detailed above violated Section 8(b)(1)(A) of the Act.

Additionally, the Respondent's publication in its membership newspaper (Frontier Reporter) of the civil complaint instituted against Ball was a violation of Section 8(b)(1)(A) of the Act. Cf. *Perry Coal Company*, 125 NLRB 1256 (1959), enfd. 284 F.2d 910 (7th Cir. 1960). By the publication of such complaint, the Respondent signaled to its membership the potential detrimental consequences of exercising their statutory rights to file unfair labor practice charges and provided a means by which employees were coercively dissuaded from seeking the Board's assistance.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By filing a complaint in the Supreme Court, County of Erie, State of New York, seeking compensatory damages, punitive or exemplary damages, reasonable attorney fees, costs, and disbursements from William L. Ball, alleging therein that Ball initiated charges with the National Labor Relations Board which were false, perjurious, malicious, and without probable cause and brought for the purpose of harassing, annoying, and damaging the Respondent, the Respondent has violated Section 8(b)(1)(A) of the Act.

3. By publicizing in the Respondent's membership newspaper (Frontier Reporter) the above-mentioned lawsuit against Ball in November and December 1980, the Respondent violated Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

---

[14] The Respondent's assertion that it can rely on advice of counsel as a defense in this case is not well taken. "The legislative mandate prohibits interference whether intentionally interfering or not, whether pursuant to *bona fide*, competent advice of an expert or not. Congress did not here give the protection available under some other statutes to those who act in good faith upon advice given by competent, honest lawyers, accountants, or other experts." *N.L.R.B.* v. *Hendel Manufacturing Co.*, 483 F.2d 350–353 (2d Cir. 1973).

[15] Respondent in its civil complaint sought "compensatory damages in the sum of Twenty-Five Thousand Dollars ($25,000.00), and punitive or exemplary damages in the sum of Fifty Thousand Dollars ($50,000.00)."

"Punitive damages" are defined as damages assessed by way of punishment to the wrongdoer or example to others and not as a money equivalent of the harm done, Restatement, "Contracts," § 342a. "Punitive damages" act not by way of compensation but by way of punishment of the wrongdoer and as an example to others. *Sanders* v. *Rolnick*, 67 N.Y.S. 2d 652, 657, 188 Misc. 627.

Punitive damages are sometimes spoken of as "vindictive damages" and "exemplary damages." They are sometimes referred to as "smart money" and "blood money." They are called punitive damages because of the theory that such damages will act as a sort of punishment of the defendant for such wrongdoing; not only as a punishment for past wrongdoing, but to deter the defendant and others in similar business from repeating such wrongdoing. *Oliver* v. *Columbia, N. & L.R. Co.*, 43 S.E. 307, 320, 65 S.C. 1.

The Respondent's use of the punitive damage device bespeaks its motive, for it must have known that such damages are not awarded unless it be by way of punishment.

[16] Not only is it clear from the Respondent's state court complaint and the credible testimony in this case that the Respondent's purpose was to punish Ball, but Respondent also in its publication in the Frontier Reporter of November 1980, prior to the filing of the suit, reported, "the Guild intends to ask for punitive damages in an amount not yet decided." Thus, the Guild unmistakably signaled what would happen if members who were on the Guild's unpalatable list filed unfair labor practice charges against it with the Board.

I recommend that the Respondent cease and desist from prosecuting that part of its state court complaint, which refers to Ball's unfair labor practice charge, being specifically paragraphs 20, 21, 22, 23, 24, and 25 and paragraph C of its prayer, and that the Respondent be required to withdraw and dismiss that part of the complaint. I further recommend that Ball be allowed no attorney fees for defense of the state court lawsuit at this time; however, I recommend that jurisdiction be retained for the purpose of assessing such attorney fees in the event the Respondent does not prevail on the remainder of the state complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The Respondent, The Buffalo Newspaper Guild, Local 26, The Newspaper Guild, AFL–CIO–CLC, Buffalo, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Prosecuting that part of the complaint in the case of *Buffalo Newspaper Guild, Local 26, The Newspaper Guild, by its President Richard J. Roth* v. *Kenneth W. Kostolecki and William L. Ball*, Index No. E87467 (Supreme Court, Erie County, State of New York), which refers to Ball's unfair labor practices, being specifically paragraphs 20, 21, 22, 23, 24, and 25 and paragraph C of its prayer which arose out of Ball's filing of an unfair labor practice charge with the National Labor Relations Board.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw and dismiss that part of its complaint in the case of *Buffalo Newspaper Guild, Local 26, The Newspaper Guild, by its President Richard J. Roth* v. *Kenneth W. Kostolecki and William L. Ball*, Index No. E87467 (Supreme Court, Erie County, State of New York), which refers to Ball's unfair labor practice charges, being specifically paragraphs 20, 21, 22, 23, 24, and 25 and paragraph C of its prayer.

(b) Post at its offices in Buffalo, New York, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be published in the Frontier Reporter and posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this Decision; provided, however, jurisdiction of this action shall be retained in accordance with that part of this decision entitled "The Remedy."

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."